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No. 03-1027

In the Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
PETITIONER

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The President, explicitly invoking Congress's Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Authorization or Authorization of Force), as well as his authority as Commander in Chief, made a determination that Jose Padilla "is, and at the time he entered the United States in May 2002, was, an enemy combatant," that Padilla is "closely associated with al Qaeda" and has engaged in "hostile and war-like acts," and that "it is in the interest of the United States that" he be detained "as an enemy combatant." Pet. App. 57a-58a. The President's determination represents a core exercise of the authority both conferred by Congress and granted him by Article II, and it makes clear that Padilla, under *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942), squarely fits this Court's definition of an enemy combatant subject to military seizure and detention.

Respondent's argument that the President lacks authority to order Padilla's military detention rests on two erroneous submissions: (i) that the President's action, although explicitly undertaken pursuant to Congress's Authorization, should be set aside on the ground that some more "clear statement" of authorization from Congress was required; and (ii) that Padilla—although he met repeatedly with senior al Qaeda operatives after the September 11 attacks, received training from al Qaeda operatives on wiring explosives and stayed at an al Qaeda safehouse in Pakistan, and returned to the United States at al Qaeda's direction to advance the conduct of attacks against the United States—is not an enemy combatant subject to military seizure and detention. Those arguments are rooted in a basic misunderstanding of this Court's decisions in *Quirin* and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and in an equally flawed understanding of Congress's Authorization of Force and 18 U.S.C. 4001(a). In fact, the *Quirin* Court did not require the kind of clear congressional statement envisioned by respondent, and the majority of the *Quirin* saboteurs were not formally enrolled in the German army. On the antecedent question of

habeas jurisdiction, respondent likewise fundamentally misconstrues both this Court's decisions and the governing habeas statutes in arguing that jurisdiction can properly lie in the Southern District of New York over a challenge to Padilla's present confinement in South Carolina.

A. Habeas Jurisdiction In This Case Lies In The District Of South Carolina Rather Than The Southern District Of New York

The petition in this case challenges Padilla's present, physical confinement in South Carolina, and seeks both modification of the conditions of, and release from, that confinement. Clear principles of law and logic require such a petition to be filed in South Carolina. In a habeas action challenging present physical confinement, the proper respondent is the detainee's immediate physical custodian, and the custodian must be within the territorial jurisdiction of the district court. Respondent argues that Secretary Rumsfeld is a proper respondent, and that jurisdiction in this case would lie in *any* district court with long-arm jurisdiction over Secretary Rumsfeld. That outcome is foreclosed by the habeas statutes and this Court's decisions.

1. The proper respondent to the amended petition is Padilla's immediate custodian, Commander Marr

This Court long ago settled that in a habeas challenge to present confinement, the "person having custody of the person detained" (28 U.S.C. 2243) is the "person who has the *immediate custody* of the party detained." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added); see *Pennsylvania Bureau of Corrections* v. *United States Marshals Serv.*, 474 U.S. 34, 38-39 (1985). It is undisputed that Padilla's immediate custodian is Commander Marr, Commanding Officer of the Brig where he is held.

Respondent asserts (Br. 46) that the habeas statutes allow naming as respondent any "non-immediate custodian" with a measure of "legal control" over the detainee. That contention cannot be squared with the Court's opinion in *Wales*, or with a long line of decisions applying the immediate custodian rule. To be sure, the Court since *Wales* has expanded its understanding of the circumstances in which a person is in "custody" for purposes of seeking habeas relief. See *Hensley* v. *Municipal Court*, 411 U.S. 345, 350 & n.8 (1973); Gov't Br. 18 n.6. But those developments do not affect the rule under *Wales* that the proper respondent in a traditional challenge to present confinement is the detainee's immediate custodian. The Court thus continues to rely on *Wales* for the rule that, when a "prisoner * * * seeks relief," the writ acts "upon the person who holds him," *i.e.*, the "jailer." *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 494-495 (1973) (internal quotation marks omitted).

The Seventh Circuit recently followed *Wales* in a unanimous opinion precisely on point here, holding that the proper respondent in a habeas action filed by a detained enemy combatant is the Commanding Officer of the Brig, not the Secretary of Defense. *Al-Marri* v. *Rumsfeld*, 360 F.3d 707, 709 (2004). As the court correctly explained, the "legal control" test espoused by respondent is relevant only if the challenge is to something other than present, physical confinement. In that situation, the "person having custody of the person *detained*" (28 U.S.C. 2243 (emphasis added)) necessarily is someone other than an immediate physical custodian, making it "necessary to identify as a 'custodian' someone who asserts the legal right to control that is being contested." 360 F.3d at 711. But that "does not imply that, when there is only one 'custody' taking the form of physical detention, anyone other than the warden or equivalent official is a proper respondent." *Id.* at 712.

Respondent errs for precisely that reason in relying (Br. 46) on cases like *Strait* v. *Laird*, 406 U.S. 341 (1972), involving unattached military reservists who sought release from their service obligations. Because an unattached reservist is not subject to any form of physical control or confinement, requiring him to proceed against an immediate custodian would "exalt fiction over reality." *Id.* at 344.[1]

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[1] Petitioner errs in relying (Br. 46) on *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), and *Ex parte Endo*, 323 U.S. 283 (1944). With respect to

2. The district court cannot reach a habeas custodian located beyond its territorial jurisdiction

The habeas statutes also confine district courts to issuing the writ "within their respective jurisdictions." 28 U.S.C. 2241(a). Congress added that constraint because it was thought "inconvenient, potentially embarrassing, certainly expensive, and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo* v. *United States*, 364 U.S. 611, 617 (1961). The result is that, in a challenge to present detention, the writ is "issuable only in the district of confinement." *Id.* at 618; accord, *Al-Marri*, 360 F.3d at 709 (citing *Carbo* and *Wales*).

a. Respondent contends (Br. 48) that this Court initially embraced that understanding in *Ahrens* v. *Clark*, 335 U.S. 188 (1948), but disavowed it in *Braden*, *supra*. That argument is a "non sequitur." *Al-Marri*, 360 F.3d at 711. *Ahrens* held that habeas jurisdiction requires the presence within the forum district of *both* the custodian and the detainee. See 335 U.S. at 190-191. Subsequently, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), the Court overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and allowed a habeas petitioner to challenge his *future* confinement. Strict application of the requirement in *Ahrens* that both the custodian and detainee be present in the same district would effectively have nullified *Peyton* for prisoners like Braden, who were confined in one jurisdiction (Alabama) and sought to challenge a detainer related to future detention in a different jurisdiction (Kentucky). Braden filed his challenge to his future Kentucky confinement in the

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Johnson, because the Court in that case found "no basis for invoking federal judicial power in *any* district," it made no suggestion "as to where, if the case were otherwise, the petition should be filed." 339 U.S. at 790-791 (emphasis added). In *Endo*, the detainee properly named her immediate custodian as a respondent and filed where she was then held, which is precisely what respondent here declined to do. The Court found that Endo's later relocation by the government did not divest the initial habeas court of jurisdiction.

Western District of Kentucky. This Court, rather than limit the promise of *Peyton*, sustained jurisdiction by relaxing that part of *Ahrens* that required the *detainee* to be confined in the district in which he brings suit. *Braden*, 410 U.S. at 495-500.

Braden left wholly intact, however, the requirement that the *custodian* be located within the territorial jurisdiction of the district court in which suit is filed. See *Al-Marri*, 360 F.3d at 711-712; *Monk* v. *Secretary of the Navy*, 793 F.2d 364, 368-369 (D.C. Cir. 1986). For purposes of his challenge to his future detention in Kentucky, Braden "was in the custody of Kentucky officials," *Hensley*, 411 U.S. at 351 n.9, and "Braden sued his Kentucky custodian in Kentucky, just as § 2241(a) provides." *Al-Marri*, 360 F.3d at 711. But nothing in *Braden* remotely suggests that a challenge to Braden's present confinement in Alabama could have been brought anywhere but Alabama. See *id.* at 712.

b. Respondent understands *Braden* (Br. 49-50) to establish that a district court can reach any habeas respondent who would be subject to long-arm jurisdiction in a general civil suit, see Fed. R. Civ. P. 4(k)(1), a reading that would permit multiple district courts to assert jurisdiction in a given case (and potentially allow a single court to hear claims brought by detainees throughout the Nation, see *Al-Marri*, 360 F.3d at 710). The habeas laws make clear throughout, however, that only *one* district court has jurisdiction in a challenge to present, physical confinement—the district court for the district in which the detainee is held. See, *e.g.*, 28 U.S.C. 2242 ("If addressed to the Supreme Court, a justice thereof or a circuit judge [the application] shall state the reasons for not making application to *the* district court of the *district in which the applicant is held.*") (emphasis added); see Gov't Br. 23. Accordingly, when Congress decided to extend habeas jurisdiction to enable an additional district court to assert "concurrent jurisdiction to entertain the application" along with the "district court for the district

wherein such person is in custody," it amended the habeas statutes. 28 U.S.C. 2241(d).[2]

Respondent's argument, moreover, is foreclosed by *Schlanger* v. *Seamans*, 401 U.S. 487 (1971). Respondent's reasoning suggests that a habeas action like this one against a federal officer could be filed in *any* federal district in the Nation, because under 28 U.S.C. 1391(e), federal officers are subject to nationwide service of process in civil actions. But this Court held in *Schlanger* that Section 1391(e) does not relax the traditional rule in habeas cases that district courts may issue the writ only "within their respective jurisdictions." 28 U.S.C. 2241(a). The Court explained that, in habeas proceedings, "jurisdiction over the respondent [is] territorial," and "the legislative history of [Section 1391(e)] is barren of any indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490 & n.4. That result certainly survives *Braden*, which came just two years later: the *Schlanger* Court, accurately anticipating *Braden*, explained that "even under the minority view in *Ahrens*" under which "the critical element [is] not where the applicant [is] confined but where the custodian [is] located"—*i.e.*, the holding soon reached in *Braden*—there still was no jurisdiction in *Schlanger* because the custodian was not "within the territorial jurisdiction of the District Court." *Id.* at 490-491.

Respondent does not address or even cite *Schlanger*. But if, as *Schlanger* holds, a federal *statute* providing for nationwide service in civil cases fails to relax Section 2241(a)'s territorial constraint on habeas jurisdiction, a federal *rule* providing for service under state long-arm statutes in civil cases necessarily leaves that constraint unaffected. See Fed. R. Civ. P. 82 (Rules "shall not be construed to extend * * *

[2] Respondent focuses (Br. 48-49) on the Court's remark in *Braden* that jurisdiction lies "[s]o long as the custodian can be reached by service of process." 410 U.S. at 495. That statement does not purport to address *where* the custodian may be served, however, and the Court had no occasion in *Braden* to consider service beyond the district court's territorial jurisdiction. To the contrary, the Court explained that the Kentucky custodian was "properly served *in that district*," *i.e.*, within the Kentucky court's territorial jurisdiction. *Id.* at 500 (emphasis added).

the jurisdiction of the United States district courts."). Consequently, because Commander Marr (and even Secretary Rumsfeld) is located outside the Southern District of New York, the district court lacks jurisdiction.[3]

Padilla suggests (Br. 47) that none of this established law should apply here because of the "unique circumstances" of this case. But as the Seventh Circuit's decision in *Al-Marri* indicates, while the authority invoked to detain enemy combatants may be "unique" when compared to a typical criminal or immigration case, the resulting habeas challenge to the legality and conditions of an enemy combatant's present, physical confinement is a classic use of the writ. Perhaps for this reason, the Civil War-era precedents on which Padilla and his amici principally rely (*Milligan* and *Ex parte Merryman*, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9487)) involved writs directed at the local military authorities and filed in the district of detention. Finally, although Padilla repeatedly refers to his "military seizure" in New York (Br. 47, 48), this case involves a habeas petition challenging the legality of his present detention in South Carolina, not a tort action challenging his military seizure in New York. Indeed, the specific claims for relief in Padilla's amended petition seek not only release from his present confinement in South Carolina, but also alteration of the conditions of his confinement in South Carolina. See J.A. 56. The nature of the relief sought only underscores the wisdom of the traditional habeas rules that require such a petition to be filed in South Carolina.

[3] Respondent errs in relying (Br. 45) on *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). That case in no way suggests that a habeas challenge to present confinement can be brought outside the district of confinement. To the contrary, the prisoners were detained in the District of Columbia, and filed for habeas relief there. See *id.* at 75-76. The language in the opinion cited by respondent pertains not to habeas jurisdiction, but to the proper location for *prosecuting* the prisoners. See *id.* at 136.

B. The President Has Authority As Commander In Chief And Pursuant To Congress's Authorization For Use Of Military Force To Order Padilla's Detention As An Enemy Combatant

1. The military's wartime authority to seize and detain enemy combatants fully applies to Padilla

a. The Court's decision in *Quirin* establishes that Padilla is squarely subject to the military's long-settled authority to detain enemy combatants in a time of war. The "universal agreement and practice" under the "law of war," the Court observed, holds that enemy combatants are "subject to capture and detention * * * by opposing military forces" in the course of an armed conflict. 317 U.S. at 30-31. The Court thus upheld the assertion of military control over the saboteurs (including an assumed American citizen), who had been seized by law enforcement agents in Chicago and New York before they could effectuate plans to destroy domestic war facilities.[4] The Court explained that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war." *Id.* at 37-38.

That understanding directly applies here. The President determined, in materially indistinguishable terms, that Padilla is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," that he has engaged in "hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States," that he "represents a continuing, present and grave danger to the national security," and that he "is, and at the time he entered the United States in May 2002 was, an enemy combatant." Pet. App. 57a-58a.

[4] The saboteurs claimed that they did not in fact intend to commit acts of sabotage, and they had been directed to commit no acts of sabotage within ninety days of arriving in the United States. See 317 U.S. at 25 n.4; Pet. Br. 8-9, *Quirin*, *supra* (Nos. 1-7, 1942 Term).

Indeed, whereas the *Quirin* combatants affiliated with German forces during World War II, received explosives training in Germany, and came to the United States with plans to destroy war facilities, Padilla was closely associated with al Qaeda after September 11, 2001, trained with al Qaeda and researched explosive devices at an al Qaeda safehouse, and returned to the United States to advance the conduct of further al Qaeda attacks. It follows that Padilla, as much as the *Quirin* saboteurs, is an "enemy belligerent[] within the meaning of * * * the law of war." 317 U.S. at 38.

b. Respondent nonetheless argues (Br. 12-16, 27-31) that this case is controlled not by *Quirin*, but by *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). That argument lacks merit. *Milligan* involved a citizen seized by the military and convicted by military commission on charges that he had conspired against the United States in the Civil War. *Id.* at 6-7. Although Milligan "conspired with bad men" to carry out acts damaging to the United States (*id.* at 131), he did not affiliate or train with Confederate forces (and in fact had never been a resident of any State in the Confederacy). See *id.* at 121-122.

Respondent argues (Br. 12) that "Padilla's case fits squarely within the framework of *Milligan*," and (Br. 15) that "*Quirin* was a narrow decision, explicitly confined to the precise facts before the Court." Respondent has it backwards. In *Quirin*, the Court unanimously confined *Milligan* to its specific facts, "construi[ing] the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it." 317 U.S. at 45. The Court found *Milligan* "inapplicable" to the circumstances in *Quirin*, explaining that Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war." *Ibid.* Padilla, by contrast, was determined by the President to be "closely associated with al Qaeda," and his actions directly parallel those of the *Quirin* combatants.[5]

[5] Respondent is no more successful in analogizing Padilla to the citizens charged with treason for aiding the *Quirin* saboteurs (Br. 30), than in

c. Respondent errs in perceiving (Br. 28) a "critical distinction" between the *Quirin* combatants' "membership" in the German forces and Padilla's "close association" with al Qaeda. The distinction is wrong as a matter of both fact and law. In the first place, "[i]t was unclear whether the saboteurs were civilians or not: only two of them, Burger and Neubauer, were formally enrolled in the German army." Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004). Although they came ashore in partial uniforms to provide them with a plausible claim to prisoner of war status, and thus may have been assigned to military units, the majority were not enrolled in the military and were recruited from civilian life because of their ability to blend in once they arrived in the United States. For that reason, the government in *Quirin* emphasized that "civilians as well as soldiers are all within th[e] scope" of the war crimes charged. Gov't Br. 39, *Quirin*, *supra*; see also *Eisentrager*, 339 U.S. at 765 (dismissing as "immaterial" whether Germans were affiliated with civilian agency or military).

The Court in *Quirin* did not rest its decision on the formal status of the saboteurs, but rather held that a "non-belligerent" is a person who is not "a part of *or associated with* the armed forces of the enemy." 317 U.S. at 45 (emphasis added). The Court's use of the disjunctive and other state-

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analogizing Padilla to Milligan. As this Court recognized in *Quirin*, some conduct by citizens could constitute grounds for either a treason or war crimes prosecution, see 317 U.S. at 38, and the Executive has substantial discretion in choosing how to proceed. See *Colepaugh* v. *Looney*, 235 F.2d 429, 433 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957). But even if the difference between the *Quirin* saboteurs and the defendants in *Cramer* v. *United States*, 325 U.S. 1 (1945), and *Haupt* v. *United States*, 330 U.S. 631 (1947), reflected more than an exercise of executive discretion, there is no question that Padilla falls on the *Quirin* side of the line. The defendants in *Cramer* and *Haupt* did not travel abroad and train with enemy forces on using explosives. The *Quirin* saboteurs, like Padilla, did, and as a result were treated as enemy combatants and ultimately executed.

ments in the opinion preclude any argument based on formal membership rather than association.[6]

Any distinction based on formal membership also would have perverse implications. Under respondent's view, the *Quirin* saboteurs who were not enrolled in the military were immune from treatment as enemy combatants simply because they were not formally inducted into the armed forces. That rationale would stand the laws of war on their head, affording *more* protection to, and exempting entirely from the laws of war, enemy forces that violate the basic conditions for lawful belligerency—such as having a responsible command structure and wearing fixed insignia openly identifying association with enemy forces. See, *e.g.*, Ingrid Detter, *The Law of War* 136 (2d ed. 2000).

Al Qaeda does not wage war using conventional forces with formal command structures, membership ranks, and insignia. Indeed, because "Al Qaeda has no clear membership standards," formal membership in al Qaeda is essentially

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[6] See 317 U.S. at 37-38 ("Citizens who *associate* themselves with the military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of * * * the law of war.") (emphasis added); *id.* at 35 n.12 (discussing "acts which, when committed within enemy lines by persons in civilian dress *associated with* or acting under the direction of enemy forces") (emphasis added). It is likewise well-established that individuals who are nominally civilians but associate with and aid the enemy are subject to military jurisdiction. That is particularly true with respect to the two Articles of War specifically charged in *Quirin*, Articles 81 and 82 (currently codified at 10 U.S.C. 904, 906), which govern providing intelligence to the enemy and spying. See Edmund M. Morgan, *Court Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79, 97-112 (1920) (cited in *Quirin*, 317 U.S. at 41 n.13); William Winthrop, *Military Law and Precedents* 767 (2d ed. 1920), Gov't Br. 38-39, *Quirin*, *supra*; *id.*, App. II 72-77 (surveying history of use of military commissions including against civilians). See also *Quirin*, 317 U.S. at 42 n.14. It is telling that the provisions dealing with providing intelligence to the enemy and spying—unlike most provisions of the Uniform Code of Military Justice (UCMJ) which are limited to persons "subject to this chapter" or to "members of the armed forces," *e.g.*, 10 U.S.C. 884, 885—extend to "any person" who engages in the prohibited conduct. 10 U.S.C. 904, 906.

irrelevant. Audrey Kurth Cronin, *CRS Report RS21529, Al Qaeda After the Iraq Conflict*, at 3 n.10 (May 23, 2003). Cf. *Reid* v. *Covert*, 354 U.S. 1, 22-23 (1957) ("We recognize that there might be circumstances where a person could be 'in' the armed services * * * even though he had not formally been inducted into the military or did not wear a uniform.") (plurality). In any event, there is no question after *Quirin* that a person who receives explosives training from al Qaeda operatives at the direction of al Qaeda leaders and stays in an al Qaeda safehouse is associated with al Qaeda by any measure.

2. The President's exercise of Commander-in-Chief authority in this case is fully supported by Congress

The President's determination that Padilla should be detained as an enemy combatant is a basic exercise of the Commander-in-Chief power, and it falls well within the broad sweep of Congress's Authorization for Use of Military Force. The President's authority therefore is at its maximum. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). Respondent contends that the President's determination should be set aside on the ground that Congress did not speak with requisite clarity in its Authorization of Force. That argument is seriously flawed.

a. Respondent argues (Br. 36-38) that the President lacks any independent authority as Commander in Chief to order Padilla's detention as an enemy combatant. That issue is not directly raised by this case because Congress's Authorization of Force supplies an ample statutory basis for the President's action. But the President relied in addition on his authority as Commander in Chief—authority Congress acknowledged in its Authorization—and that reliance was fully justified.

The Commander-in-Chief Clause grants the President authority not only to defend the Nation when it is attacked, but also to "determine what degree of force the crisis demands." *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863); see *Campbell* v. *Clinton*, 203 F.3d 19, 27 (D.C. Cir.) (Silberman, J., concurring), cert. denied, 531 U.S. 815 (2000). The capture and detention of enemy combatants is an inherent part of waging war, and the President's decision whether to detain a person as an enemy combatant is a basic exercise of his discretion to determine the level of force needed to prosecute the conflict.

Contrary to respondent's argument (Br. 37), nothing in *Youngstown* casts doubt on the President's authority in this case. The President's order in *Youngstown* that the Secretary of Commerce take control of private steel mills to prevent a work stoppage is different in kind from the President's order that the Secretary of Defense detain Padilla as an enemy combatant. Whereas "the President's attempt to link the [steel] seizure to prosecuting the war in Korea was * * * too attenuated," "[i]n this case the President's authority is directly tied to his responsibilities as Commander in Chief" in conducting the conflict against al Qaeda. Pet. App. 64a (Wesley, J., concurring in part, dissenting in part).

To the extent both orders at an abstract level of generality could loosely be described as involving action in the "domestic sphere" (Pet. App. 32a), there is no rigid rule, as *Quirin* confirms, restricting the President's authority to detain combatants seized in domestic territory. Moreover, there is a significant difference between an exercise of the war power domestically to counter a domestic threat (as here and in *Quirin*) and a domestic initiative designed to aid the prosecution of a foreign war (as in *Youngstown*). That difference takes on added significance in view of the nature of the September 11 attacks, launched by combatants within the Nation's borders against targets on domestic soil. While the President's foreign affairs power may be at its zenith when he acts abroad, his Commander-in-Chief power is at its height when the Nation itself comes under attack. See *The Prize Cases*, 67 U.S. at 668.

b. The President not only invoked his authority as Commander in Chief, but also *explicitly invoked* the authority

conferred by Congress's Authorization of Force. The issue thus is not whether the President's determination in the abstract falls within Congress's Authorization, but whether the President permissibly concluded that it does. And when the President explicitly acts pursuant to a broad grant of authority from Congress in an area in which he also possesses independent constitutional powers, the courts may set aside the President's action as exceeding the authority conferred by Congress only in exceptional circumstances. See *Dames & Moore*, 453 U.S. at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'") (quoting *Youngstown Sheet*, 343 U.S. at 637 (Jackson, J., concurring)).

Respondent thus fundamentally errs in arguing (Br. 16-27) that the President's action in this case must be set aside by the courts absent a "clear statement" by Congress authorizing it. In fact, *Quirin* instructs that the controlling clear statement principle runs in the reverse direction. As *Quirin* explains, a "detention * * * ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger" is "not to be set aside by the courts without the *clear conviction* that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25 (emphasis added).

The Court's application of that standard in *Quirin* is instructive. Contrary to respondent's argument (Br. 18), the Articles of War then in effect did not provide "highly specific authorization" for detaining the saboteurs for trial by commission. Indeed, the Articles at that time did not specifically provide that they applied to *enemy* forces at all. See 317 U.S. at 27. Article 2 (ch. 227, 41 Stat. 787), entitled "Persons Subject To Military Law," set forth that the "following persons are subject to these articles," and the ensuing list referred only to United States personnel. Moreover, Article 15 (41 Stat. 790), on which the Court principally relied (317

U.S. at 28), did not affirmatively authorize a commission but did so by negative implication, stating that the "provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions * * * of concurrent jurisdiction in respect of offenders or offenses that * * * by the law of war may be triable by such military commissions." In addition, the Court rested its decision on the general charge, not tethered to any specific Article, of a violation of the common "law of war," rather than relying on the more specific charges of war crimes codified by Congress in Articles 81 and 82, 41 Stat. 804. 317 U.S. at 23, 46. Those are not the actions of a Court searching for a clear statement from Congress.

The remaining decisions relied on in support of respondent's clear statement rule do not suggest otherwise. For instance, in *Brown* v. *United States*, 12 U.S. (8 Cranch) 110 (1814), the Court held that the declaration of war in the War of 1812 did not of its own force permit seizure of personal property (a load of timber) belonging to an enemy alien and found in this country. That holding rested on the accepted rule under the law of war concerning personal property wholly unconnected to the hostilities; and it has no application to personal property usable for a war-related purpose. See William Winthrop, *Military Law and Precedents* 780 (2d ed. 1920) ("Private property * * * is now in general regarded as properly exempt from seizure except where suitable for military use or of a hostile character."). Indeed, this Court has emphasized the discretion granted to military authorities in dealing with contraband suitable for military use. See *United States* v. *Diekelman*, 92 U.S. 520, 526-527 (1876). The *Brown* decision thus sheds little light on the President's authority to seize and detain an enemy combatant. The Court in fact emphasized in *Brown* that the disputed seizure of property was not "made under any instructions from the president of the United States; nor is there any evidence of its having his sanction." 12 U.S. at 122.[7]

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[7] Respondent's argument for a clear statement rule also relies (Br. 17) on *Ex parte Endo*, 323 U.S. 283 (1944). The Court in *Endo* instructed,

c. There could be no "clear conviction" (*Quirin*, 317 U.S. at 25) in this case that the President's determination to detain Padilla as an enemy combatant lies beyond the broad authority conferred by Congress's Authorization of Force. Indeed, the President's action would readily satisfy even the standard proposed by respondent. Congress specifically recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism," Preamble, 115 Stat. 224, and Congress broadly authorized the President to use "*all* necessary and appropriate force" against the forces responsible for the September 11 attacks "in order to prevent *any* future acts of international terrorism against the United States," § 2(a), 115 Stat. 224 (emphasis added).

Because seizing and detaining enemy combatants is universally regarded as an essential part of warfare, see *Quirin*, 317 U.S. at 30-31, the Authorization of Force necessarily encompasses the detention of enemy combatants. That conclusion is reinforced by 10 U.S.C. 956(5), which gives the military standing *authorization* to use funds for expenses related to "persons in the custody of the [military] whose status is * * * similar to prisoners of war, and persons detained in the custody of the [military] pursuant to Presidential proclamation." Congress thereby communicated its acceptance that the use of military force inherently entails the detention of enemy forces. See *Dames & Moore*, 453

however, that the "fact that the Act" was "silent on detention does not of course mean that any power to detain is lacking." *Id.* at 301. The Court found that a statute with the "single aim" of protecting "the war effort against espionage and sabotage" failed to support the detention of a concededly loyal citizen. *Id.* at 300. "Detention which furthered the campaign against espionage and sabotage would be one thing," the Court explained, "[b]ut detention which has no relationship to that campaign is of a distinct character." *Id.* at 302. Here, by contrast, Congress sought to "prevent any future acts of international terrorism against the United States" by those individuals and organizations responsible for the September 11 attacks, § 2(a), 115 Stat. 224, and the detention of Padilla—an al Qaeda operative who trained with al Qaeda and stayed at an al Qaeda safehouse—has an obvious "relationship to that campaign."

U.S. at 677 (relying on statutes that are "highly relevant in the * * * sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented"). See also 10 U.S.C. 802(a)(9) (standing provision subjecting "[p]risoners of war in custody of the armed forces" to UCMJ).[8]

Respondent argues (Br. 23) that Congress's Authorization does not specifically address "military detention of citizens." But the Authorization supports the President's use of force against any "organization" or "person" that "he determines" aided the September 11 attacks, without suggesting any condition on that authority based on citizenship. § 2(a), 115 Stat. 224. The Authorization elsewhere uses the narrower term "citizen," recognizing the need to "protect United States citizens both at home and abroad." Preamble, 115 Stat. 224. Moreover, Congress acted with presumed understanding of the longstanding rule that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of [his] belligerency." *Quirin*, 317 U.S. at 37.

There likewise is no basis for concluding that the Authorization only permits detention of combatants seized "on the battlefield in Afghanistan." Resp. Br. 25. *Quirin* rejected any such distinction, 317 U.S. at 38, and it is especially unwarranted in the current conflict. Congress was reacting to attacks that were launched by combatants who were within the Nation's borders and who struck targets far from any traditional battlefield. Congress accordingly found that

[8] There is no merit to respondent's contention (Br. 27), with respect to 10 U.S.C. 956(5), that the Court in *Endo* rejected a "virtually identical" argument. *Endo* concerned a "lump *appropriation*" for the "*overall* program[s]" of the War Relocation Authority, 323 U.S. at 303 n.24 (emphasis added), which the Court concluded did not amount to implicit ratification of the particular aspect of the Authority's programs involving detention of concededly loyal citizens. Section 956(5) presents the reverse situation. It is an *authorization* measure rather than a funding measure, and it confers standing authority to use appropriated funds *specifically* for the purpose of detaining enemy combatants. In that sense, Section 956(5) is, if anything, more specific than the standing Articles of War relied on in *Quirin* as conferring a statutory basis for the President's actions in that case.

the attacks "continue to pose an unusual and extraordinary threat to the national security," and sought to ensure the protection of "citizens both at home and abroad." Preamble, 115 Stat. 224. The Authorization thus cannot plausibly be read as containing an unexpressed condition that the President confine his use of force to battlefields in Afghanistan.

More fundamentally, respondent's effort to read various unstated exceptions into Congress's sweeping language is misguided at its inception. As this Court has explained, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take," and "[s]uch failure of Congress * * * does not, '*especially . . . in the areas of foreign policy and national security*,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678 (emphasis added) (quoting *Haig* v. *Agee*, 453 U.S. 280, 291 (1981)); see *id.* at 668 ("When the President acts pursuant to an express *or implied* authorization from Congress, * * * the executive action would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.") (emphasis added) (internal quotation marks omitted). Accordingly, there is no basis for setting aside the President's determination, made in explicit reliance on the Authorization, on the ground that it falls outside the broad discretion conferred in him by Congress.[9]

d. Because the President's order that Padilla be detained as an enemy combatant was pursuant to Congress's Authorization of Force, the detention is "pursuant to an Act of Congress" for purposes of 18 U.S.C. 4001(a). Section 4001(a) therefore has no bearing on this case. In any event, Section

[9] Respondent argues (Br. 25-26) that the Authorization of Force must be construed narrowly to avoid rendering certain provisions in the Patriot Act superfluous. That argument is baseless. The cited provisions in the Patriot Act have nothing to do with the use of military force, but instead pertain to the Attorney General's detention, pending removal proceedings or criminal prosecution, of resident aliens suspected of, *inter alia*, terrorist activity. See 8 U.S.C. 1226a(a) (Supp. I 2001). The provisions apply without regard to whether an alien is associated with an enemy, and indeed, without regard to the existence of an armed conflict.

4001(a)—referred to by respondent, but *not Congress*, as the "Non-Detention Act" (Br. 20)—does not constrain the military's long-settled authority to detain enemy combatants. The statute's prohibition against the detention of American citizens "except pursuant to an Act of Congress" was directed at detention by civilian, not military, authority: in particular, the detention authority given the Attorney General under the Emergency Detention Act of 1950, and the detention camps instituted for Japanese-American citizens in World War II.

Respondent argues (Br. 20-21) that the World War II detention camps were largely controlled by military personnel, and contends more generally that Congress could not have perceived any significant distinction based on whether the detention of a citizen was at the hands of civilian or military authority. But the distinction between detention of loyal citizens by civilian authority and the detention of enemy combatants by military authority was drawn by this Court in *Ex parte Endo*, 323 U.S. 283 (1944). In ordering the release of a concededly loyal citizen from a World War II detention camp, the Court "noted at the outset" that it did not confront "a question such as was presented in [*Quirin* or *Milligan*] where the jurisdiction of military tribunals * * * was challenged." *Id.* at 297. The Court stressed that Endo "is detained by a civilian agency, the War Relocation Authority, not by the military," and that "[a]ccordingly, no questions of military law are involved." *Id.* at 298.

Congress also indicated its intention that Section 4001(a) speak solely to civilian detentions by deliberately styling the provision as an amendment to an existing provision in Title 18 ("Crimes and Criminal Procedure") rather than Title 10 ("Armed Forces") or Title 50 ("War and National Defense") —specifically, a provision directed to the Attorney General's control over federal prisons. 18 U.S.C. 4001(b); see 18 U.S.C. 4001 (1970). Although the Authorization of Force plainly extends to detentions, if Congress had intended Section 4001(a) to limit the President's authority over enemy combatants and had included it in Titles 10 or 50 with other provisions

relevant to the war power, some members of Congress might have alluded to it in debating the Authorization. By contrast, the War Powers Resolution, which is codified in Title 50 and is relevant to Congress when authorizing force, was discussed over 50 times in the legislative debates and is referenced in the Authorization. The President's authority—indeed, duty—to protect the United States when it comes under attack is too critical to construe it as limited by a statute manifestly directed at a different problem, so much so that no member of Congress referenced it in debating the Authorization, and neither the petitioner in this case nor the petitioner in *Hamdi* referred to it in the habeas petitions under review.

Under respondent's understanding that Section 4001(a) encompasses the military's detention of enemy combatants, the statute would bar the military from detaining—either as a prisoner of war or enemy combatant—an American citizen captured while fighting for the enemy in conventional battlefield combat. Congress should not be assumed to have intended to interfere in such an unprecedented manner with the President's exercise of his basic constitutional powers as Commander in Chief. See *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 455 (1989).

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For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case should be remanded with instructions that the amended petition be dismissed for lack of jurisdiction. In the alternative, the judgment should be vacated and the case should be remanded for further proceedings consistent with the Court's opinion.

Respectfully submitted.

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